Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States
October Term, 1997

MADELINE A. PENCHISHEN,
Petitioner,

v.

THE STROH BREWERY CO.,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED FOR REVIEW

Is Summary Judgment precluded in an Americans with Disabilities Act case where Employee produces evidence that her employer transferred her from a sedentary position to a position which she was unable to perform because it required extensive walking even where the trial judge finds that Employee's ability to walk was not "substantially limited" under normal circumstances?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner, Madeline A. Penchishen, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered on May 9, 1997 is unreported and appears at page 20a of the Appendix.

The Order of the United States District Court for the United States District Court for the Eastern District of Pennsylvania rendered on July 24, 1996 is reported at 932 F.Supp 671 (E.D.Pa. 1996) and appears at page 1A of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit was dated May 9, 1997 and this Petition for Certiorari is timely filed within ninety (90) days thereof.

FEDERAL PROVISION INVOLVED

The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

STATEMENT OF THE CASE

In this case, Petitioner sued her former employer, the Stroh's Brewery Co. ("Stroh's") for firing her instead of reasonably accommodating her disability. Petitioner contends that the District Court erred when it granted Petitioner's Motion for Summary Judgment because Petitioner only "walks slow," and hence is not "substantially limited" in the "major life activity" of walking. 29 C.F.R. § 1630.2(j)(2). Petitioner does not concede that her ability to walk is not "substantially limited." More to the point, Petitioner has amply demonstrated that her difficulty with walking has "substantially limited" the "major life activity" of the more inclusive term "working" and hence was established a *prima facia* disability. 29 C.F.R. § 1630.2(*i*). Petitioner claims that her

claim should survive summary judgment where her employer assigned her a job which required extensive walking when the employer knew Petitioner had, at the least, difficulty walking, because such a job assignment substantially limited Petitioner's ability to work.

STATEMENT OF THE FACTS

Petitioner, Madeline A. Penchishen, began working for Stroh's as a key punch operator in 1988. In 1993, Petitioner suffered serious injuries in an automobile accident which severed the bones in her foot from the rest of her leg. She had metal plates inserted into her ankle enabling her to walk at all. When Petitioner had recovered enough to return to work in 1994, she resumed her key punch job, which she was able to do because it was almost entirely sedentary. Shortly thereafter, Petitioner was

informed that her job was being eliminated, and she would have to be reassigned to work on the factory floor. Due to her injuries, Petitioner's gait was reduced to half of her normal walking speed, and she had extreme difficulty navigating steps, so she met with Stroh's director of Human Relations in order to determine an available job that suited her disabilities. At this meeting, she understood that she was being assigned a job in "Quality Assurance" because she could perform it, considering her physical limitations.

However, once Petitioner assumed her actual job duties, she discovered that her new job assignment was exceedingly difficult to perform. Petitioner was required to walk around the plant retrieving beer samples, which necessitated using several stairways, at

least one stairway per two hour period, while carrying six 40 ounce bottles of beer. In the early going, Petitioner's co-workers assisted her by bringing the samples to her, but when management learned about this *de facto* accommodation spontaneously performed by Petitioner's co-workers, they forbade the co-workers from providing further assistance to Petitioner.

Petitioner subsequently learned that another available job, in the Packaging Department, involved working in one area, and very little walking. Shortly thereafter, Petitioner met with the new Human Relations director, and informed him that she could ably perform her current job if Stroh's fixed an existing elevator, which would have obviated the need for her to climb so many stairs. Stroh's refused to grant Petitioner this

reasonable accommodation. Petitioner also asked to be relocated to the more sedentary job in the Packaging Department. This request was also not honored. Petitioner was then terminated, on November 3, 1994. Subsequently, Petitioner filed this action for unlawful discharge in violation of the ADA.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

This case presents this Honorable Court the opportunity to forestall the use of specific "major life activities" included in 29 C.F.R. § 1630.2(*i*) (1995) (including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, [and] learning") to find that a person is not disabled, when applying the more generic term "working" (also included in 29 C.F.R. § 1630.2(*i*)) would indicate a

finding of a disability.

In the case at bar, it is undisputed that Petitioner has difficulty walking. The District Court held, and the Third Circuit affirmed, that this difficulty did not amount to a "substantial limitation" on the "major life activity" of "walking," and therefore Petitioner was not disabled for the purposes of the Americans with Disabilities Act ("the ADA"). In her Brief in Opposition to Defendant's Motion for Summary Judgment, Petitioner argued to the District Court that her ankle injury forced her to "work" slowly, due to her difficulty walking. See, Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p.14. However, in its opinion, the District Court failed to analyze Petitioner's difficulty "working" and instead focused on Petitioner's

difficulty "walking." Such a change in focus is significant, because assuming arguendo that Petitioner's difficulty "walking" does not rise to a "substantial limitation" as defined in 29 C.F.R. § 1630.2(j), Petitioner's difficulty "**working**" was substantially limited, since the job to which she was assigned after the termination of her clerical position required extensive walking. See, Penchishen v. Stroh's Brewery, 932 F.Supp. 671, 674 (E.D.Pa. 1996) (at 6A herein) ("Far from being the best job for her, Quality Assurance turned out to be a very poor choice. The position involved walking between the plant laboratory and the plant floor several times a day to gather samples. These areas were divided by two sets of stairs totalling about 26 steps.") If District Courts are permitted to ignore the term "working" in

29 C.F.R. § 1630.2(*i*) and use more the more specific ailments included therein to avoid a finding of disability, even when employees' "non-substantial limitations" are the proximate cause of employees' inabilities to perform their assigned duties, the purpose of the ADA will be subverted. Such an injustice is especially pertinent in the case at bar, where Petitioner alleges that Respondent assigned Petitioner a job that it knew she could not perform due to her difficulty walking.

ARGUMENT

IS SUMMARY JUDGMENT PRECLUDED IN AN AMERICANS WITH DISABILITIES ACT CASE WHERE EMPLOYEE PRODUCES EVIDENCE THAT HER EMPLOYER TRANSFERRED HER FROM A SEDENTARY POSITION TO A POSITION WHICH SHE WAS UNABLE TO PERFORM BECAUSE IT REQUIRED EXTENSIVE WALKING EVEN WHERE THE TRIAL JUDGE FINDS THAT EMPLOYEE'S ABILITY TO WALK WAS NOT "SUBSTANTIALLY LIMITED" UNDER NORMAL CIRCUMSTANCES?

A. The inclusion in 29 C.F.R. § 1630.2(*i*)

of the term "working" should allow an employee to prove that her disability substantially limited her ability to "work" without reference to the more specific functions included therein. The trial judge only considered whether Petitioner's difficulty walking was a "substantial limitation" on her walking. The District Court held that since Petitioner only walked more slowly than usual, but could still walk, that her ability to walk was not "substantially limited" under 29 C.F.R. § 1630.2(*i*) (1995), and hence concluded she was not disabled. Penchishen v. Stroh Brewery Co., 932 F.Supp. 671, 674-75 (E.D.Pa. 1996). But, the evidence showed that her difficulty walking **did** substantially interfere with her ability to **work** at the job to which she was assigned, because it involved extensive walking, which the

trial judge specifically noted. Id. at 674 ("The position involved walking between the plant laboratory and the plant floor several times a day. . . ."). The trial judge's refusal to consider Petitioner's inability to "work" separately from her inability to "walk" constituted an error that subverted the purpose of the ADA and regulations thereunder. Since the regulations specifically include "working" as a separate function, aside from performing manual tasks and walking, the District Court erred by failing to consider the possibility that difficulty walking might amount to a "substantial limitation" on working. This is a particularly egregious error where Petitioner produced evidence that she was placed in her job by Respondent's Human Relations director, who knew about Petitioner's disability,

and purported to accommodate her.

The District Court heavily relied upon similarities between the case at bar and Kelly v. Drexel Univ., 907 F.Supp. 864 (E.D.Pa. 1995). In that case, Drexel defended on the grounds that Kelly's termination was a routine matter of reduction in force, and had nothing to do with his "disability." A key difference between Kelly v. Drexel Univ. and the instant case is that Kelly did not proffer any evidence that his disability was in any way linked to his termination. Since Kelly's job did not require him to walk, he could not allege that his difficulty walking encumbered his ability to work. Petitioner alleges that her difficulty walking, even if not substantial by itself, did constitute a "substantial limitation" on her ability to work in the job she was given. The

District Court's failure to independently consider the extent to which Petitioner's condition was a "substantial limitation" on her ability to "work" constituted error, and this Honorable Court should remand so the District Court can make that determination.

B. **The extent to which Petitioner was "substantially limited" in walking is meaningless unless considered in conjunction with the demands of her job.** Petitioner has presented direct evidence of bias against her disability via her assignment to a job requiring extensive walking, which the Human Resources director purported would accommodate her disability. In fact, another job was available which would have afforded Petitioner a stationary working environment.

Again, even assuming arguendo that

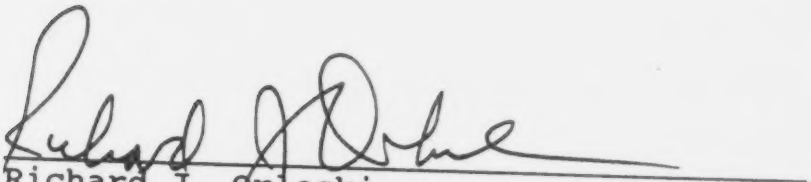
Petitioner's difficulty walking did not rise to the level of a "substantial limitation" of her ability to walk, when Stroh's deliberately assigned Petitioner to a job that required an inordinate amount of walking and the constant need to use stairs, Respondent **forced** upon Petitioner a substantial limitation of her ability to "work," which is a covered activity under 29 C.F.R. § 1630.2(*i*) (1995). Such discriminatory treatment rises to the level of direct evidence of discriminatory animus. See, Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1996).

CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari ought to be granted, and the case should be remanded to the District Court to determine whether Petitioner's ability to work was substantially limited.

Respectfully submitted,

ORLOSKI & HINGA



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MADELINE A. PENCHISHEN: CIVIL ACTION
:
V. :
:
THE STROH BREWERY CO. : NO. 95-CV-7275

MEMORANDUM AND ORDER

JOYNER, J.

This is an employment discrimination action by Plaintiff Madeline A. Penchishen, a former employee of Defendant the Stroh Brewery Company. In her Complaint, Plaintiff alleges that Defendant unlawfully terminated her employment on account of: (1) her alleged disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-13 (1995) ("the ADA") and (2) her age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1985 & Supp. 1996)

("the ADEA").[1] Defendant seeks summary judgment on the entire Complaint.

STANDARD OF REVIEW

This Court is authorized to award summary judgment "if the pleadings, depositions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to survive a summary judgment motion, the non-moving party must raise "more than a mere scintilla of evidence in its favor" and may not merely rely on unsupported assertions, conclusory allegations, or

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[1] In addition, the Complaint alleges a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e--2000e-17 (1994). In response to Defendant's motion, Plaintiff concedes that she cannot support her Title VII claim. Accordingly, summary judgment shall be granted on Count III.

mere suspicions. William v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Boiled to its essence, the summary judgement standard requires the non-moving party to create a "sufficient disagreement to require submission [of the evidence] to a jury." Liberty Lobby, 477 U.S. at 251-52.

FACTUAL BACKGROUND

Taken in the light most favorable to Plaintiff, the facts are as follows.[2] In

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[2] Plaintiff fails to cite to the record in the Fact section of her brief. This Court has tried its best to track down the sources of Plaintiff's allegations, but has not been entirely successful. For example, Plaintiff asserts in her brief that "[i]n his deposition, [Defendant's director of Human Resource] Mike Gray admitted that he never even reviewed Plaintiff's personnel file, and he was turning down Plaintiff's request for a reasonable

1994, when she was discharged, Plaintiff was a 51 year old long-time employee of Defendant, working as a key punch operator in Defendant's data processing unit. In 1993, Plaintiff had been seriously injured in an automobile accident. As a result of the accident, she missed six months of work, but then returned in July, 1994 to her old position as a key punch operator.

A lasting result of Plaintiff's injury is the existence of a metal plate in her left ankle. Because of the plate, Plaintiff does not have full flex in her

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accommodation because of his bias against Plaintiff because of her age and handicap." Pl.'s Br. p. 10. After reading all of Mike Gray's deposition, this Court only found a concession that Mr. Gray never read Plaintiff's personnel file, but nothing about a bias based on her age or disability. In this and like situations, this Court has not included those alleged facts in the instant Memorandum nor considered them in its decision.

ankle and cannot walk at a normal gait or pace; rather, her pace is ½ as fast as it was before the accident. In addition, Plaintiff must use stairs by placing both feet on each step before moving to the next step.

Two months after Plaintiff returned to work, her key-punch job was eliminated in a cost-cutting measure along with several other jobs. Pursuant to her labor agreement with Defendant, Plaintiff was given the opportunity to "bid into" other open positions at Defendant. At a meeting with the Human Resources Director, Dave Lichtle, Plaintiff was told that there were two open positions; one in Packaging, one in Quality Assurance. Also at this meeting, Plaintiff and Lichtle discussed which job was best suited for Plaintiff based on her impairment. Lichtle allegedly told

Plaintiff that the best job was in Quality Assurance and that he would assign her to that position. Plaintiff alleges that because of her seniority level, if she had elected the Packaging position, she would have been awarded that job over the two women who did move to that department.

Far from being the best job for her, Quality Assurance turned out to be a very poor choice. The position involved walking between the plant laboratory and the plant floor several time a day to gather samples. These areas were divided by two sets of stairs totalling about 26 steps. The position also required Plaintiff to perform laboratory tests on the beer itself and the seals placed on the bottles.

Once on the job, Plaintiff's weekly performance reviews were not favorable

and reflected that Plaintiff had difficulty learning the technical aspects of her job. Plaintiff alleges that many of her problems arose from the difficulty she had moving from place to place in a timely fashion. Because of Plaintiff's poor performance, Defendant arranged a meeting with her to terminate her before her 30-day probation period ended.

At that meeting, Plaintiff insisted that she could learn the Quality Assurance position if she had more time. In the alternative, she requested a transfer to Packaging, to a position she believed did not involve much walking. This request was subsequently denied and Plaintiff was terminated.

Plaintiff alleges that her Quality Assurance position was filled by a man in his twenties named Ronald Mihalko who had previously worked for Defendant as summer

temporary help. Mihalko started in Quality Assurance at the same time as Plaintiff and they were trained for the job simultaneously.

DISCUSSION

I. AMERICANS WITH DISABILITIES ACT

The ADA prohibits discrimination against qualified people with disabilities. A disability is:

1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
2) a record of such impairment; or
3) being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A). Courts must determine on a case by case basis whether a particular person has a disability. Smaw v. Commonwealth of Va., 862 F.Supp. 1469 (E.D.Va. 1994).

It is well established that not every physical impairment is a disability, because not every physical

impairment substantially limits a life activity. Nedder v. Rivier College, 908 F.Supp. 66, 74 (D.N.H. 1995). To determine whether an impairment is a disability, courts take a pragmatic, fact-intensive look at each plaintiff and determine:

1) the nature and severity of the impairment,
2) the duration or expected duration of the impairment, and
3) either the actual or the expected permanent or long term impact of or resulting from the impairment.

42 U.S.C. § 1630.2(j)(2). The key is whether the limitation is substantial, that is, what effect the impairment has on the life of the individual. 29 C.F.R. § 1630.2(j).

For example, if the affected major life activity is the act of working, courts ask whether the impairment poses a substantial barrier to all or most employment, or bars just one particular

class or type of job. Hughes v. Bedsole, 48 F.3d 1376 (4th Cir.) cert denied 116 S.Ct. 190 (1995); Welsh v. City of Oklahoma, 977 F.2d 1415, 1417 (10th Cir. 1992). If the major life activity is the act of walking, the plaintiff must show that he or she is substantially limited in walking. Not, for example, simply that plaintiff must use a handrail to climb stairs or must limit walking to less than one mile. Kelly v. Drexel Univ., 907 F.Supp. 864, 874 (E.D.Pa. 1995).

Defendant asserts that Plaintiff is not substantially limited in any major life activity and that therefore, she is not protected by the ADA. In opposition, Plaintiff maintains that she is disabled because she walks slowly and cannot use stairs as most people do. Further, Plaintiff points to her medical records,

which show that her injury will worsen over time.

After carefully reviewing the matter, we hold that Plaintiff has not created an issue of fact as to whether she is currently disabled. There is no evidence that she was substantially limited in the major life activity of walking even though plaintiff's ability to walk was limited in some ways.

In the alternative, Plaintiff contends that Defendant perceived her as disabled. It is undisputed that many of Defendant's management knew about Plaintiff's accident and injury and also that her impairment was apparent to any observer. In addition, Plaintiff points to Defendant's Human Resources director's testimony that he suggested the Quality Assurance job to Plaintiff because he thought it would be easier on her leg.

Plaintiff maintains that she has demonstrated that Defendant perceived her as being disabled because anyone could tell that she was impaired and because one person in management made business decisions based on her impairment.

We agree that this evidence could show that Defendant believed Plaintiff had an impairment. We disagree, however, that the evidence creates a genuine issue of fact as to whether Defendant perceived Plaintiff's impairment as a substantial limitation on any major life activity. In fact, it tends to show that Defendant did not perceived Plaintiff as substantially limited in the activities of walking or working because it encouraged her to work in a position that required walking. Taking Plaintiff's evidence as true, therefore, there is no evidence that could support a reasonable

jury's verdict that Plaintiff was perceived to be substantially limited in any major life activity. For these reasons, summary judgment is appropriately granted on Plaintiff's ADA claim.

II. AGE DISCRIMINATION IN EMPLOYMENT

Plaintiff alleges that Defendants violated the ADEA by firing her on account of her age. The ADEA is intended to "promote employment of older persons" and prohibits firing people on account of their age. 29 U.S.C. § 621, 623. To state a prima facie case under the ADEA, a plaintiff must show that age was a determinative, but not necessarily sole, factor in the decision to discharge. Billet v. Cigna Corp., 940 F.2d 812, 816 (3d Cir. 1991). This can be done circumstantially by showing that the plaintiff (1) is within a protected

class, (2) was qualified for the position, (3) was dismissed despite those qualifications, and (4) was replaced by someone sufficiently younger to permit an inference of age discrimination. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992).

Here, Plaintiff insists that she has made out a prima facie case because she (1) was 51 years old when she was terminated, (2) was qualified for either a clerical position or another position with reasonable accommodation, (3) was terminated despite those qualifications and (4) was replaced by someone younger than her.

Defendant takes issue with Plaintiff's contentions that she was qualified and that she was replaced with a younger worker. We first look to whether Plaintiff has created an issue of

fact as to whether she was replaced with a younger worker. Plaintiff's argument is basically that she, a 51 year old employee, was discharged, whereas Mihalko, a young employee, was retained.

Plaintiff concedes that Mihalko started in Quality Assurance at the same time she did, and that no one was specifically hired to replace her.[3] Our understanding of her argument is that, in fact, there was only one Quality Assurance available when she a Mihalko were hired. Because Mihalko had worked on the factory floor, he adapted to his Quality Assurance job faster than she did and that therefore, Defendant retained Mihalko and discharged Plaintiff.

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[3]It is apparently uncontested that several months after Plaintiff's discharge, Defendant filled an empty Quality Assurance position with a 52 year old man.

Although Plaintiff's brief on this point is murky, as we understand it, she contends that the fact that no one was hired to replace her proves that there was never a position for her. Rather, her hiring and then poor reviews may have been a subterfuge to allow Defendant to terminate Plaintiff and be able to truthfully say that no person "replaced" her, because the true occupant of the only available Quality Assurance position was already in place. If this is, in fact, Plaintiff's theory, it fails. She proffers absolutely no evidence that could support any aspect of this nefarious plot.

That being said, we turn now to the evidence Plaintiff has proffered to determine whether it creates an issue of fact as to whether she was replaced by a younger worker. First, Plaintiff averred

in her affidavit that her "Quality Assurance job was given to Ronald Mihalko, a young male in his 20's, who was a new hire with no seniority, and whose only experience with the company was as a "Summer Temporary Help." Pl.'s Aff. ¶ 57. This averment, however, is contradicted by Plaintiff's own deposition wherein she was questioned about this averment. In her deposition, Plaintiff conceded that Mihalko did not "replace" her, but was assigned to Quality Assurance and trained at the same time she was. Without sufficient explanation, a non-movant cannot create a genuine issue of fact via an affidavit that contradicts the party's own deposition testimony. Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) (quoting Martin v. Merrell Dow Pharms., Inc., 851 F.2d 703, 706 (3d Cir. 1988)).

The only other evidence Plaintiff could base her age claim on is what a co-worker told her he overheard one manager tell another, namely, that management wanted Plaintiff out of the lab. Pl.'s Dep. at 170. Plaintiff conceded though, that she did not know whether management did not want her because of her age or some other reason. Id. at 171.

Given the lack of any evidence to support a finding that Defendant replaced Plaintiff with a younger worker, we cannot find that Plaintiff has made out a prima facie case under the ADEA. For that reason, we grant summary judgment on Plaintiff's ADEA claim.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MADELINE A. PENCHISHEN:		CIVIL ACTION
V.	:	
	:	
THE STROH BREWERY CO.	:	NO. 95-CV-7275

ORDER

AND NOW this 24th day of July, 1996, upon consideration of Defendant The Stroh Brewing Company's Motion for Summary Judgment and response thereto and in accordance with the attached Memorandum, the Motion is hereby ENTERED in favor of Defendant The Stroh Brewing Company and against Plaintiff Madeline A. Penchishen on all counts.

BY THE COURT:

/S/ J. Curtis Joyner, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1807

MADELINE A. PENCHISHEN, Appellant

v.

THE STROH BREWERY CO., Appellee

Before: MANSMANN and McKEE, Circuit Judges; SCHWARTZ, District Judge sitting by designation.

Filed: May 9, 1997

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

/S/ CAROL LOS MANSMANN, Circuit Judge